Nos. 21,621, 21,632 and 21,649

In the United States Court of Appeals for the Ninth Circuit

GALLENKAMP STORES CO.; MERCURY DISTRIBUTING COMPANY; ACME QUALITY PAINTS; AND F & G MERCHANDISING, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RETAIL CLERKS UNION LOCAL 770, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, INTERVENOR

K-MART, A DIVISION OF S. S. KRESGE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RETAIL CLERKS UNION LOCAL 770, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, INTERVENOR

HOLLYWOOD HAT CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RETAIL CLERKS UNION LOCAL 770, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, INTERVENOR

On Petitions to Review and Set Aside, and on Cross-Petitions to Enforce an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petitions to review and set aside an order of the National Labor Relations Board, issued against petitioners (herein the Employers) on December 30, 1966, and on the Board's cross-petitions for enforcement pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[1] The Board's decision and order (R. 324-328, 305-313)[2] are reported at 162 NLRB No. 41. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act, the record in the representation proceeding (Board Case No. 21-RC-9309) is part of the record before the Court pursuant to Section 9 (d) of the Act. This Court has jurisdiction, the unfair labor practices having occurred in the City of

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[1] The pertinent statutory provisions are reprinted in the Appendix, *infra*, pp. 72-76.

[2] References to the pleadings, the decision and direction of election, the Regional Director's supplemental decision and direction, the Board's decision on review and certification of representative, the decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of the representation proceedings reproduced pursuant to Court Rules 10 and 17 are designated "R. Tr." "Er. X." refers to exhibits in the representation proceeding. References to portions of the stenographic transcript of the unfair labor practice complaint proceedings are designated "C. Tr." "G.C.X." refers to exhibits of the General Counsel. Whenever in a series of references a semicolon appear, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

Commerce, California, within this judicial circuit. No jurisdictional issue is presented.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that the Employers violated Section 8(a)(5) and (1) of the Act by their admitted refusal to bargain with the Union [3] which had been certified by the Board, following the representation proceedings described below, as the exclusive bargaining representative of the Employers' employees in an appropriate unit.[4]

The representation proceedings here involved were processed under Board rules and regulations adopted pursuant to a 1959 amendment to Section 3(b) of the Act, which authorizes the Board to delegate to its regional directors certain of its statutory powers over such proceedings and permits the Board to review such action.[5] The Board's findings are summarized below.

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[3] Retail Clerks Union Local 770, Retail Clerks International Association, AFL-CIO, herein called "the Union." The Union has intervened in the instant proceedings.

[4] The unit is "all regular full-time and part-time employees employed at K-Mart's Commerce, California, store, including selling, nonselling, and office clerical employees, and employees of licensees; excluding guards, professional employees, and supervisors as defined in the Act" (R. 308; 21).

[5] The 1959 amendments added the following language to Section 3(b):

> "The Board is also authorized to delegate to its regional directors its powers under Section 9 to determine the

A. *The Representation Proceedings.*

1. *The Regional Director's unit determination in Board Case No. 21-RC-9309*

K-Mart, a Division of S. S. Kresge Company, owns and manages a retail department store at Commerce, California (R. 15; R. Tr. 34). Several of the selling departments at the Commerce store are operated by licensees pursuant to uniform lease agreements with K-Mart (R. 15; R. Tr. 37-38, 42, 70, Er. X. 1). In December 1964, pursuant to Section 9(c) of the Act, the Union filed a representation petition with the Board's Regional Director in Case No. 21-RC-9309,[6]

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unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of Section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph * * *." See, *N.L.R.B.* v. *Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 251, n. 26 (C.A. 5).

[6] The Regional Director consolidated Case No. 21-RC-9309 with three other representation cases (Board Cases Nos. 21-RC-9128, 21-RC-9130 and 21-RC-9308) each of which involved a separate store-wide unit of employees at one of three K-Mart stores at Westminster, Santa Ana, and San Fernando, California, respectively (R. 7-12). Following the hearing, the Regional Director severed Board Case No. 21-RC-9308, which concerned the San Fernando K-Mart store (R. 14). The Regional Director's decision and direction of elections in the remaining three cases pertained to K-Mart's stores at Commerce, Westminster and Santa Ana (R. 14-22). The proceeding before the Court pertains only to the Union's certification as bargaining representative at the Commerce store (R. 329-356).

seeking certification as the bargaining representative of a store-wide unit at K-Mart's Commerce store, including the employees of licensees Gallenkamp Stores, Mercury Distributing Company, Acme Quality Paints, F & G Merchandising, Hollywood Hat Co., and Besco Enterprises, Inc. (R. 14; 10).[7]

Following a hearing on the Union's petition, the Regional Director issued a decision and direction of elections in which he found, contrary to the contentions of K-Mart and its intervening licensees (Mercury Distributing Company, and Gallenkamp Stores), that each of the licensees and K-Mart were "joint employers of the employees in each of their respective departments" (R. 307; 15). The Regional Director also found, contrary to K-Mart, Mercury and Gallenkamp, that a store-wide unit including all employees at the Commerce store was appropriate, and directed an election (R. 16, 21-22). On March 5, 1965, K-Mart requested the Board to review the Regional Director's Decision and Direction of Elections on the grounds, *inter alia*, that the record did not establish that it was a joint employer with the licensees, and that employees of F & G Merchandising could not properly be included in the unit because they lacked sufficient community of interest with the other unit employees employed at K-Mart's Commerce store (R. 307; 23-73).[8] F & G Merchandising also re-

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[7] There was no disagreement among the parties to the representation proceeding that separate, single-store units would be appropriate (R. 16; R. Tr. 21).

[8] In its Request for Review, K-Mart also contested the exclusion of three assistant managers from the Commerce

quested the Board to review the Regional Director's Decision and Direction of Elections on these same grounds (R. 307; 75-87). Gallenkamp and Mercury sought Board review of the Regional Director's Decision and Direction of Elections on the ground that the record did not show that K-Mart and its licensees were joint employers (R. 307; 88-97). On March 30, 1965, the Board denied the requests for review on the ground that they raised "no substantial issues warranting review" (R. 307; 98).[9]

The Regional Director's finding that K-Mart and each of its licensees constituted joint employers of the licensees' departments was based upon the following facts developed at the hearing:

As noted above, at p. 4, K-Mart's Commerce store includes several departments operated by licensees under uniform lease agreements with K-Mart. The licensees include Gallenkamp, which sells shoes; Mercury, which sells clothing; Acme, which sells paint and other household items; F & G Merchandising, which

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unit, contending that they enjoyed a sufficient community of interest with unit employees to warrant inclusion (R. 54-59). However, in the instant unfair labor practice proceeding, that contention has been abandoned.

[9] Section 102.67(f), Series 8 of the Board's Rules, as amended (29 C.F.R. 102.67(f)) provides, in part, that "denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." Thus, the Board's denial of the requests for review of the Regional Director's decision and direction of election at K-Mart's Commerce store constituted an affirmance of the Regional Director's unit determination.

sells automobile accessories and services automobiles; Hollywood Hat, which sells hats; and Besco, selling jewelry and cameras (R. 15; R. Tr. 38-39). Each of the licensed departments operates as an integral part of the K-Mart Commerce store, and none is identifiable by customers as other than a department of that store (R. 15; R. Tr. 88-93, Er. X. 1, p. 4). Goods, including items sold by the licensees, are bagged or wrapped in unmarked paper at central checkout stands, where the employees say, "Thank you for shopping at K-Mart" (R. Tr. 99-100). Under the provisions of K-Mart's license agreements, the licensees must "conduct sales on the premises solely under the name of K-Mart," and may not engage in advertising activity or sell goods not specified in the license agreement without the consent of K-Mart (R. 15; Er. X. 1, p. 5). K-Mart also retains the right to audit the licensee's sales records and to change the location and size of the licensed area (R. 15; Er. X. 1, p. 26). K-Mart handles all customer complaints, exchanges and refunds through its service desk (R. 15; R. Tr. 93-95). All credit sales are subject to approval by K-Mart (R. 15; R. Tr. 79-80, 195-197, Er. X. 1, p. 6).

Paragraph 4 of the license agreement requires licensees to comply with all local, state and Federal laws governing their operations, and to furnish evidence of compliance with all statutes pertaining to workman's compensation, and employee health and welfare benefits (Er. X. 1, p. 3). Further, the license agreement contains a declaration by the parties that the success of their "enterprise is dependent

upon compliance with common standards hereinafter referred to as Rules and Regulations for the conduct of the business, as established from time to time by [K-Mart]" (R. 15; Er. X. 1, p. 1). Paragraph 10 of the agreement provides:

> The Licensor shall from time to time, for the benefit of the common enterprise, establish, amend, modify or revise uniform Rules and Regulations consistent with this License Agreement which shall govern but not be limited to the following subjects: order and appearance of the store . . . employment practices, personnel and store policies . . . . The Licensor agrees to furnish Licensee with written copies of such Rules and Regulations (R. 15; Er. X. 1, p. 4).

The Rules and Regulations thus promulgated by K-Mart provide that K-Mart's manager, therein made "responsible for the over-all operation" of the store,[10] may request "immediate action" from the licensee if the K-Mart manager believes that the licensee has not provided "sufficient help, or if any employees are inefficient or objectionable" (R. 15; R. Tr. 235, Er. X. 2, p. 2). Under the heading "General Operation of Store," a licensee is directed "Not [to] permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operation of other Licensees or Licen-

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[10] At the representation hearing, Kenneth G. Sanger, merchandise manager and director of K-Mart's Western Region, declared that without the delegation of over-all responsibility to K-Mart's manager "there would be complete chaos" (R. Tr. 235).

sor" (R. 15; Er. X. 2, p. 2). Although the Rules and Regulations declare all hiring and terminations to be under the supervision of each licensee's manager, they authorize K-Mart's personnel supervisor to receive applications from persons desiring employment (R. 15; Er. X. 2, p. 1). Such applications are to be made available to the licensees on request (R. 15; Er. X. 2, p. 1). Under the Rules and Regulations, each party to the licensing agreement agrees that it will not "hire an employee or former employee of the other without first checking" with the other (R. 15; Er. X. 2, p. 1). The Rules also require licensees' employees to attend briefing and training sessions "to familiarize themselves with store policies and regulations pertaining to the conduct of the business in their department, as well as the entire operation" (R. 15; Er. X. 2, p. 3). In addition, the Rules require each licensee to operate its department during hours fixed by K-Mart (R. 15; Er. X. 2, p. 2). K-Mart's Regulations also include provisions for employee discipline,[11] smoking restrictions, rest periods, places where employees are permitted to keep their personal belongings, employee purchases,[12] employee

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[11] Employees are forbidden to do "anything that might bring criticism of themselves or the store." More specifically, "only the strictest business relations" are permitted between male and female employees; employees are required to "avoid loud talking across the store, chewing gum, using too much make-up, [or visiting] with friends while on duty. Husbands or wives of employees shall not spend excessive time in the store." The Rules also provide that unauthorized use of emergency exits shall be cause for dismissal.

[12] "*Employee Purchases.* All store purchases by employees must be taken unsealed to a supervisor designated by the

wearing apparel and identification badges,[13] and the greeting of customers (R. 15; R. Tr. 101-103, 184-188, Er. X. 2).

2. *The Regional Director's Supplemental Decision and Direction*

On April 7, 1965, the Regional Director conducted an election among the employees at K-Mart's Commerce store (R. 307; 153, 109). The tally of ballots showed that there were approximately 80 eligible voters and that 79 ballots were cast. Of these, 37 were in favor of, and 33 against representation by the Union; 9 ballots were challenged (R. 153; 109). The challenged ballots were sufficient in number to affect the results of the election (R. 307; 153, 109). The Union and K-Mart filed timely objections to conduct affecting the results of the election (R. 307; 153, 110-121, 163-168). Pursuant to the Board's Rules and Regulations,[14] the Regional Director conducted an

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Licensor. Such purchases will be sealed with the register tape and be available to be detached by the person who approves packages taken from the store" (Er. X. 2, p. 1).

[13] Male employees are required to wear ties and coats; female employees to wear "uniform smocks or aprons," to be laundered at licensee's expense.

[14] Section 102.69(c), Series 8, as amended (29 C.F.R. 102.69(c)). These rules provide, in pertinent part:

> If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges or both. * * * If the election has been conducted pursuant to a direction of

administrative investigation of the challenges and objections, without a hearing. On June 30, 1965, following this investigation, the Regional Director issued his Supplemental Decision and Direction, sustaining challenges to 4 ballots, overruling challenges to 5 ballots and ordering that they be opened and counted, finding all of the Union's objections to be without merit, and finding all but one of the Employers' objections to be without merit (R. 307; 153-162). The Regional Director further ordered that if the revised tally showed that a majority of valid ballots had been cast for the Union, the election should be set aside on the basis of an Employer's objection he found meritorious (pp. 15-17, *infra*), and a new election conducted as a subsequently designated time (R. 307; 162). The instant proceeding is concerned only with the Union's challenge to the ballot of R. Pentecost, and the Employers' objections. The pertinent substance of the Regional Director's decision is summarized below:

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election issued following any proceeding under Section 102.67 [as was the case here], the regional director may * * * exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director.

a. R. Pentecost's challenged ballot

The Union challenged R. Pentecost's ballot, contending that he was not employed in the bargaining unit on the eligibility date fixed by the Regional Director's Direction of Elections (R. 153, 154). The Regional Director's Direction of Elections provided in pertinent part (R. 21-22):

> Elections by secret ballot will be conducted by the undersigned . . . at the time and place set forth in the notice of election to be issued subsequently . . . . Eligible to vote are those in the units who were employed during the payroll period immediately preceding [February 24, 1965]."

The Regional Director's investigation revealed, and it is undisputed, that F & G's payroll period ran from Thursday until Wednesday (R. 155). Thus, February 24, 1965, a Wednesday, was the last day of an F & G payroll period (R. 155). Prior to the date of the election, the Regional Director issued a notice of election (R. 99) which declared the eligibility date to be the last day of the "payroll period ending prior to February 24, 1965." Thus, under the Regional Director's Direction of Elections and the subsequent notice of elections, the eligibility date for F & G employees was February 17, 1965. The Employers did not question that this was the eligibility date, but claimed that Pentecost was a unit employee on and after that date (R. 154). The facts as found by the Regional Director, on the basis of his administrative investigation, are undisputed, and are as follows:

At the time of the election, on April 7, 1965, Pentecost was employed at the Commerce store by F & G Merchandising as a mechanic in the automotive department (R. 154). However, F & G hired him on or about February 1, 1965, at K-Mart's Costa Mesa, California, store, on the recommendation of Richard Wall, then a manager-trainee scheduled to be appointed F & G's manager at K-Mart's Commerce store within a few weeks (R. 154-155). Wall sought Pentecost as his mechanic for the Commerce store, and requested that he be hired and trained at the Costa Mesa store pending Wall's transfer to Commerce (R. 155). Wall became manager of F & G's Commerce operation on February 18 (R. 155). Pentecost began working at Commerce, and Wall put his name on the payroll for the first time, on February 19, 1965, two days after the eligibility date fixed by the Regional Director's Decision and Direction of Election issued on Wednesday, February 24, 1965 (R. 155). Not until April 30, 1965, did F & G Merchandising charge Pentecost's Costa Mesa wages to its Commerce operation (R. 155).

On the basis of the foregoing, the Regional Director found that Pentecost did not become an employee at F & G's Commerce operation until February 19, 1965, two days after the eligibility date (R. 155). Accordingly, the Regional Director concluded that Pentecost was ineligible to vote, and sustained the Union's challenge to his ballot (R. 155).

b. The Employers' Objections

1) In the first of their six objections, the Employers alleged that on several occasions during March

and April 1965, Union representatives threatened employees with loss of employment if they did not join or support the Union, or if they opposed it (R. 157-158; 110-111). The Regional Director found the following, on the basis of his investigation:

In one of two incidents, a Union representative told an employee, "If you don't join and the Union is voted in, you will lose your job" (R. 158). In the second incident, an unidentified person told an employee, in a telephone conversation, that the Union would succeed in the forthcoming election, and that if she did not vote for the Union, she would lose her job (R. 158). The Union representative involved in the first incident denied making any threat but asserted that in some instances he told employees that the Union's contracts contained union membership provisions requiring membership after thirty days as a condition of employment (R. 158).

From the foregoing, the Regional Director concluded that there was insufficient evidence to substantiate this objection (R. 158).

2) In their second objection, the Employers alleged that during March and April 1965, and at earlier times, the Union's representatives threatened employees with physical violence and other reprisals if they did not support the Union, and, further, that the Union maintained constant surveillance of the employees' activities (R. 158; 111). In support of this objection the Employers presented evidence that an employee told his supervisors that he had been threatened (R. 158). The Employers also offered the testimony of an employee who allegedly overheard a con-

versation between the first employee and a Union representative in the store's parking lot approximately one week before the election (R. 158). The Union representative offered the employee some campaign literature, which the latter refused, adding that he didn't want the Union representative bothering him at his house (R. 158). The Union representative replied, "You we don't want. You'd better hope the union doesn't get in" (R. 158).

The Regional Director's investigation revealed that a Union representative visited the allegedly threatened employee once prior to the reported parking lot incident, and a second time on the day prior to the election, on the employee's express invitation (R. 158). Further, the employee denied that he was threatened and declared (R. 158):

> I told [the store manager] and others that I was scared of the union. I had no reason for this. I just felt that way. I had never heard from anyone that the union had threatened them.

Finally, the Union representative who allegedly made the threat denied having done so (R. 158). From his investigation, the Regional Director concluded that the Employers' second objection was without merit (R. 158).

3) In their third objection, the Employers contended that just prior to the election, the Union distributed a leaflet to employees which contained "deliberately false and misleading comparisons of wages and benefits allegedly received by employees of other employers under a 'union' contract for like work"

which "were sufficiently material to influence the employees in their determination as to how to vote . . ." (R. 158-159; 112).

The Regional Director's investigation revealed that on either April 5 or April 6, 1965, the Union distributed to employees a leaflet which gave a comparison of wage rates in various job classifications between stores under union contract and K-Mart's Commerce store (R. 159).[15] The Regional Director also found that the Union had mailed a letter to unit employees on March 26, 1965, with an attachment listing union wage rates for employees with "1 year of service," in the same classifications as were listed in the pre-election leaflet (R. 159; 170-171). The Employers contended that the leaflet was false and misleading because some K-Mart employees enjoyed an hourly wage scale higher than $1.80, and further because the union wages shown were received by employees only after one year's employment, a fact which the leaflet failed to disclose.

The Regional Director found that the K-Mart rates set forth in the leaflet were average wage rates, that the Union had no special knowledge of the actual rates at K-Mart, and that the employees had inde-

[15] The Union's leaflet contained the following comparison (R. 169):

	Wages Paid		Difference to you		
Job	K-Mart	Union	hourly.	wkly.	yrly.
Checker	$1.80	$2.35	plus .55	$22.00	$1144.00
Houseware	$1.80	2.20	plus .40	16.00	832.00
Stock Room	$1.80	2.10	plus .30	12.00	624.00
Payroll Clk.	$1.80	2.30	plus .50	20.00	1040.00

pendent knowledge with which to evaluate the Union's assertions in this regard (R. 159). Upon these facts, he concluded that the figure representing K-Mart wages in the leaflet was not a material misrepresentation and thus, did not impair the validity of the election (R. 159). However, the Regional Director, noting that K-Mart's Commerce store employed a substantial number of employees with less than one year's employment, sustained the objection on the ground that the leaflet failed to disclose that the union rates depicted were the highest of four wage progression rates within each job classification and were received by employees only after one year's employment (R. 160).

4) In their fourth objection, the Employers contended that during the eleven days preceding the election, the Union distributed a letter to the employees which misrepresented "the true facts in regard to the payment of union dues that would be required of K-Mart employees if the Union won the election" (R. 160; 112-113). As evidence supporting their contention, the Employers supplied an article published by a Union official in March 1965 (R. 160; 172-174).

The Union's letter, in pertinent part, advised the employees (R. 172):

> Your Union dues will be $5.00 per month.
>
> Upon the payment of this amount, you will receive full membership in our organization. We might add that you will not be required to pay any other fees, fines or assessments for member-

> ship in our organization. This includes the fact that you will not be required to pay double dues as some of the members have voluntarily voted to do.

The article upon which the Employers based their contention reported, in pertinent part, that a group of Union members had voted to support a Union strike fund by paying double dues (R. 174). The Regional Director found no conflict between the contents of the letter and the Union official's article (R. 160).

5) In the fifth of their objections, the Employers contended that the Union interfered with the employees' free choice by offering to waive its initiation fee in favor of each employee who voted for the Union in the representation election (R. 161; 113). In this objection, the Employers referred to the letter which was the subject of their fourth objection, and a card-sized certificate which the Union enclosed with the letter (R. 161; 172-174). In pertinent part, the Union's letter stated (R. 172):

> It has always been the policy of our Organization that we do not charge initiation fees of any kind to any newly organized members. This policy will apply to any K-Mart employee who becomes a member of our Union as the result of our winning the election at your store and who is employed there at the time the employees sign their first Union contract.

The letter also stated (R. 172), "The enclosed certificate is in furtherance of this policy . . . ." The accompanying certificate declared that the bearer would "not be required to pay initiation fees of any

kind, nor any fees other than the regular monthly dues, which shall not be required . . . until a union agreement has been signed by the employer after it has been voted upon by employees of the store and accepted by a majority vote" (R. 172-173).

The Regional Director overruled this objection upon the ground that the waiver of initiation fees set forth in the Union's letter and certificate was not conditioned upon how the individual employee would vote in the representation election, but was offered to all employees without exception (R. 161).

6) In their final objection, the Employers contended that on the morning of the election, April 7, 1965, an employee received a telephone call from a Union representative who asked if she were voting in the election and offered transportation for her convenience (R. 161-162; 113-116). The employee prolonged the conversation for about 2 hours, asking her caller, and then another Union representative, numerous questions relating to the payment of double dues, Union meetings, conditions of employment, fringe benefits, union security, the status of part-time employees, employees' rights to file a decertification petition against the Union after certification, the effects of a strike on job rights and income, and the Union's attitude toward a supervisor's display of favoritism toward an employee (R. 161). After the conversation, the employee wrote down her recollection of the questions and answers which had been exchanged over the telephone (R. 161; 175-178). The employee gave her written recollection to the assistant manager of the Commerce store, who, in conversation with her,

had previously expressed interest in obtaining answers to these questions from the Union (R. 161).

The Regional Director found that the answers, as written by the employee, contained certain misstatements concerning legal rights of employees and the Union's strike record (R. 161; 170-178).[16] The employee stated that during the reported conversation, the Union representatives told her to satisfy her doubts or disbeliefs by confirming their assertions with the employees of nearby White Front Stores or Food Giant Stores, who were covered by Union contracts (R. 161). The Regional Director concluded that "any misrepresentations described by the employee were a result of her own faulty recollection or interpretation and [were] not attributable to the [Union]" (R. 161-162). Finally, the Regional Director concluded that the alleged misrepresentations could not have "materially affected the results of the election" (R. 161-162).

3. *The Board's Decision on Review and Certification of Representative*

As previously noted, on June 30, 1965, the Regional Director issued his Supplemental Decision and Direction, ordering 5 challenged ballots opened and counted, sustaining Employers' Objection Number 3, and overruling all other objections filed by the Employers and the Union (R. 162). The Regional Director fur-

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[16] The Union representatives denied making the misstatements attributed to them, and the Regional Director credited their denials (R. 161).

ther ordered that if the revised tally showed a majority of valid ballots had been cast for the Union, the election would be set aside and a new election conducted at a subsequently designated time (R. 162). Section 102.69(c) of the Board's Rules and Regulations (29 C.F.R. Sec. 102.69(c)) provides that if the regional director issues a decision on objections or challenges, the parties shall have the rights set forth in Section 102.67 (29 C.F.R. Sec. 102.67). Sec. 102.67(c) and (d)) provides as follows:

> (c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.
>
> (d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said

> request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument.

Section 102.67(f) provides, in part, that "Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

The Employers filed timely requests for review of the Regional Director's ruling on R. Pentecost's ballot, and his overruling of Employers' Objection 1, 2, 4, 5, and 6 (R. 307; 287, 191-259). The Union requested review of the Regional Director's rulings on three challenged ballots and his sustaining of the Employers' third objection (R. 307; 287, 179-190). On July 19, 1965, the Board granted the Union's request for review insofar as it related to the Regional Director's sustaining of the Employers' third objection, denied the requests for review in all other respects on the ground that they raised "no substantial issues warranting review", and directed the Regional Director to open and count the challenged ballots as provided in his Direction (R. 307; 287, 271). The Board also provided in its order of July 19, 1965, that it would review the Regional Director's disposition of Employers' Objection 3, in the event the Union received a majority of the ballots in the revised tally (R. 307; 271). On July 23, 1965, the Regional Director opened and counted the five remaining ballots and issued a revised tally of ballots which showed that of approximately 80 eligible voters, 75 cast bal-

lots, of which 38 were for, and 37 against the Union (R. 307; 287-288, 272).

On September 9, 1965, the Board issued its Decision on Review and Certification of Representative, reversing the Regional Director's disposition of the Employers' third objection (R. 307; 287-289). In its decision on review, the Board concluded, contrary to the Regional Director, that the omission of the one-year experience qualification on the union rates listed in the Union's pre-election leaflet did not "constitute a basis for setting aside the election" (R. 307; 288-289). Consequently, the Board overruled the Employers' third objection, and certified the Union as the employees' collective bargaining representative (R. 307; 289).

B. *The Unfair Labor Practice Proceeding*

By letter dated September 21, 1965, the Union requested K-Mart to meet with it for purposes of collective bargaining (R. 327; G.C.X. 41(a)). In its answering letter of September 29, 1965, K-Mart refused the request, declaring, *inter alia:*

> It is the position of the S. S. Kresge Company that the unit of employees for which your Union seeks to act as the collective bargaining representative at our Commerce store is inappropriate and that, furthermore, the employees in such a unit have not, by a free, untrammeled and uncoerced majority selected your Union as their collective bargaining representative (R. 327, 307-308; G.C.X. 41(b)).

By separate letters, dated October 18, 1965, the Union requested Gallenkamp, Mercury, Acme, F & G,

Hollywood and Besco to meet with it for purposes of collective bargaining in the unit found appropriate by the Regional Director (R. 327, 307; G.C.X. 42(a), 43(a), 44(a), 45(a), 46(a), 47(a)). All of these employers refused to comply with the Union's request (R. 327, 307; G.C.X. 42(b), 43(b), 44(b), 45(b), 46(b), 47(b)). However, Besco replied that it had discontinued its business operations at K-Mart's Commerce store on March 30, 1965, and would not be involved in collective bargaining at that store (R. 307; G.C.X. 46(b)).

In a final letter to K-Mart, dated October 19, 1965, the Union requested bargaining, stating (R. 327, 308; C. Tr. 35-36, G.C.X. 48):

> So that there is no misunderstanding about the request made by the Union, this is to confirm the fact that the Union's request to bargain was a request upon your client to bargain in the *unit found appropriate by the Board.* (Emphasis in the original.)

K-Mart did not reply to this last request (R. 327, 308; C. Tr. 35-36).

On December 10, 1965, the General Counsel issued a complaint against the Employers (including Besco), alleging, *inter alia*, that the Union was properly certified as collective bargaining representative of a unit of the employees employed at K-Mart's Commerce, California, store; that since September 21, 1965, the Union had requested the Employers to bargain with it for this unit, and that they had refused to bargain with the Union in violation of Section 8

(a)(5) and (1) of the Act. (R. 305; 293-296). The complaint also asserted that Zale Jewelry Service, Inc. was operating the same department which Besco operated at K-Mart's Commerce store prior to March 30, 1965 (R. 308-309; 294).[17] K-Mart and Hollywood Hat, in their respective answers, and Gallenkamp, Mercury, Acme and F & G, in their answer, admitted refusing to bargain with the Union, but denied, *inter alia*, the allegations that the employees at K-Mart's Commerce store constituted an appropriate unit; that a majority of the employees at the Commerce store had voted for the Union as their collective-bargaining agent; and that the Union had requested the Employers to bargain with it as the collective-bargaining representative of the certified store-wide unit (R. 305, 308; 297-304).

At the unfair labor practice hearing, the Trial Examiner refused to permit the Employers to relitigate issues which had been fully litigated in the underlying representation proceeding, upon the ground that the Board's certification of the Union disposed of those issues (R. 308; C. Tr. 37-39). The Trial Examiner also rejected the Employers' contentions that the Union's bargaining demand was defective because it made no demand upon Zale Jewelry Service, Inc., and that the certification was invalid and the complaint defective inasmuch as they did not name Zale as a joint employer (R. 308-309). The Trial Examiner found that the Employers refused to bargain in violation of Section 8(a)(5) and (1) of the Act (R. 310).

[17] The complaint did not name Zale Jewelry Service, Inc. as a respondent (R. 309; 293).

II. The Board's Conclusions and Order

The Board adopted the Trial Examiner's finding that the Employers violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (R. 324-327). Accordingly, the Board directed the Employers to cease and desist from the unfair labor practices found, to bargain collectively with the Union upon request,[18] and to post appropriate notices (R. 327-328, 310-313).

SUMMARY OF ARGUMENT

I. The Board's determination that K-Mart and its licensees are joint employers, so that a store-wide unit of employees at K-Mart's Commerce store comprises an appropriate bargaining unit, constituted a reasonable exercise of the Board's discretion. Section 9(b) of the Act affords the Board great latitude in determining the unit appropriate for purposes of collective bargaining, and the Board's unit determination should not be disturbed by this Court unless it is arbitrary or capricious. *Foreman & Clark, Inc.*, v. *N.L.R.B.*, 215 F. 2d 396, 405-406 (C.A. 9), cert. denied, 348 U.S. 887.

K-Mart's Commerce store includes several departments which are operated by licensees pursuant to

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[18] The Board noted and corrected the Trial Examiner's inadvertent inclusion of Besco's employees in the description of the bargaining unit in his "Conclusion of Law" (R. 326 n. 5). The Board further modified the Trial Examiner's unit description by deleting the names, "Gallenkamp, Mercury, Acme, F & G, Hollywood", and thus conforming the unit description to that found appropriate in the representation proceeding (R. 326 n. 5).

uniform written agreements with K-Mart. The licensed departments operate as integral parts of the Commerce store. K-Mart and its licensees conduct their business in accordance with rules and regulations promulgated by K-Mart covering a number of employment conditions within the area of mandatory collective bargaining. Further, K-Mart has broad authority to amend, modify or revise such rules and regulations. Finally, K-Mart has directed its licensees to settle labor disputes which interfere with the Commerce store's operations. When coupled with K-Mart's right to terminate the license of a disobedient licensee, K-Mart's rule-making power, both exercised and potential, render it a necessary party to any collective bargaining which may affect the terms and conditions of employment enjoyed by its licensees' employees at Commerce. In these circumstances, the Board reasonably found K-Mart and its licensees to be joint employers. *N.L.R.B.* v. *Checker Cab Company*, 367 F. 2d 692, 696-698 (C.A. 6), cert. denied, 385 U.S. 1008; *N.L.R.B.* v. *S. E. Nichols Company*, 380 F. 2d 438, 439 (C.A. 2).

K-Mart's Commerce store resembles a single, integrated department store. Further, K-Mart and its licensees constitute joint employers of the employees in the licensees' departments. There is no bargaining history for any of the employees, and no other labor organization seeks to represent the employees of any licensee separately. In these circumstances, the determination that a storewide unit constitutes an appropriate unit conformed to the Board's long established policy in cases involving retail department

stores. See e.g., *Stern's Paramus*, 150 NLRB 799, 803.

II. Substantial evidence supported the Board's finding that F & G employee R. Pentecost was ineligible to vote in the election of April 7, 1965. Thus, the evidence shows that R. Pentecost did not report for work, nor appear on the payroll, at F & G's Commerce location until February 19, 1965, two days after the eligibility date which was fixed by the Regional Director in accordance with Board practice. Accordingly, the Board reasonably concluded that R. Pentecost was ineligible to vote in the representation election of April 7, 1965.

III. The Board acted reasonably and within its discretion in overruling the Employers' objections based upon alleged threats of reprisals in three incidents. In the first incident, a Union representative's statement to an employee that "if you don't join and the Union is voted in, you will lose your job," related only to union membership and was not conditioned upon how the employee voted. The second incident was a telephoned threat from an unidentified caller who threatened an employee with loss of employment if she did not vote for the Union. In such circumstances, his threat was insufficient to create an atmosphere of fear and reprisal. *Orleans Mfg. Co.*, 120 NLRB 630, 633-634. Further, assuming the Union's responsibility for the telephoned threat, the employee, upon reflection, would recognize that loss of employment could not be effectuated except in the unlikely event of K-Mart's acquiescence and cooperation. *Otis Elevator Company*, 114 NLRB 1490.

In the third incident, a Union representative warned an employee "You we don't want. You'd better hope the Union doesn't get in." It is most likely that such a statement would have induced the employee to vote against the Union. Accordingly, the Board properly rejected this warning as ground for setting the election aside.

The Board properly refused to find that the three instances of threats, taken together, created a general atmosphere of fear and reprisal. For, the impact of each of the three alleged remarks was limited to one employee in the unit of 80 voters, and a fourth employee who overheard one of them. Finally, such antagonizing conduct would tend to influence the employees to vote against the Union. Under these circumstances, the Board was not required to set aside the election. *Macomb Pottery Company* v. *N.L.R.B.*, 376 F. 2d 450, 454 (C.A. 7).

IV. The Board acted reasonably and within its discretion in ruling that the Union's preelection propaganda did not invalidate the election. The Union's leaflet of April 5 or 6 was substantially accurate in its comparison of wage rates in various job categories between K-Mart and similar stores under union contract. The Union's failure to state that the union rates were received by employees only after one year's employment, and that some K-Mart employees received more than the $1.80 which it depicted as K-Mart's hourly rate, did not constitute substantial departures from the truth likely to impair the employees' free choice. For, as the Board observed, the Union had previously informed the employes of the

one-year experience qualification on union rates in the area; and, further, the employees had independent knowledge of K-Mart's wage rates. Accordingly, the Board properly applied its settled policy, approved by the courts, not to set an election aside because of campaign misrepresentations unless it finds it likely that such utterances had a significant impact on the election. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60-61.

The Union's pre-election letter to employees announcing that they would not be required to pay double dues was not contradicted by an article published by the Union in its newspaper at about the same time, announcing that some Union members had voted to pay double dues to support a strike fund. Further, the Employers did not present any other evidence to support their allegation that the Union's announcement was false. Accordingly, the Board properly found no merit in the Employer's contention. *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124.

The alleged misrepresentations made by Union represenitves to employee Carol Platteborze on the morning of the representation election could not have had any impact on the election in view of her demonstrated alignment with K-Mart and the absence of further dissemination of the alleged misrepresentations to other employees. Finally, the Union's pre-election announcement of its waiver of initiation fees, which was conditioned upon the election victory and the signing of a collective-bargaining contract and not on how an employee voted in the election, did not im-

properly influence the employees' votes. *Macomb Pottery Company* v. *N.L.R.B.*, 376 F. 2d 450, 455 (C.A. 7).

V. The Board properly found that the Employers violated Section 8(a)(5) and (1) of the Act by their refusals to bargain with the Union. The Employers' refusal to bargain with the certified Union is not justified by the inclusion of Besco and the exclusion of Zale from the certified unit, or by the naming of Besco as a joint employer in the Union's demand for bargaining, its amended unfair labor practice charge, or in the complaint.

The Employers may not rely upon the substitution of Zale Jewelers for Besco as a licensee to defend their refusal to bargain; for no employees of either Zale or Besco voted in the election, the Board was not aware of the cessation of Besco's operations or the commencement of Zale's operations until the unfair labor practice proceeding herein, and the Employers withheld their immediate knowledge of these changed circumstances until that proceeding. Nor did the Employers request the Board to clarify its certification as provided under the Board's Rules and Regulations. Finally, although the charge and complaint named Besco as a respondent, this error was corrected by the General Counsel's declaration that no bargaining order was sought against Besco, and the exclusion of Besco from the Board's order.

The Union's letters to K-Mart and each of the Commerce store's licensees specifically mentioned the certification, stated that the certification was "for the employees in the K-Mart store," and then requested

"discussions" leading to a collective bargaining agreement. Further, the Employers understood that the Union was making a bargaining demand as the certified representative of a unit of their employees. In these circumstances, the Board properly rejected the Employers' contention that the Union's demands for bargaining were fatally defective. *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F. 2d 902, 908 (C.A. 9), cert. denied, 379 U.S. 961.

ARGUMENT

I. The Board's Determination That K-Mart and Its Licensees Are Joint Employers, so That a Storewide Unit of Employees at K-Mart's Commerce Store Comprises an Appropriate Bargaining Unit, Constituted a Reasonable Exercise of the Board's Discretion

The Employers have concededly refused to bargain with the duly elected and certified representative of the employees at K-Mart's Commerce store. The Employers defend their refusal on the ground, among others, that the Board erred in finding that a store-wide unit of all employees at the Commerce store constitutes an appropriate unit for collective bargaining purposes. Specifically, the Employers object, first, to the finding that K-Mart and its licensees are joint employers of the employees in each of their respective departments, and, second, to the inclusion of F & G Merchandising in the store-wide unit. The Employers argue that K-Mart and each of its licensees are separate employers and thus a store-wide unit is inappropriate for purposes of collective bargaining. A further argument urged by the Employers is that even if K-Mart and its licensees are joint employers,

the employees of F & G Merchandising should not be included in the unit because they lack a sufficient community of interest with the other unit employees.

Section 9(b) of the Act provides that "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[19] This Court has long recognized that "[G]reat latitude is given to the Board in determining 'the unit appropriate for the purposes of collective bargaining' " and that the Board's unit determination will not be disturbed unless it is arbitrary or capricious. *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 405-406, cert. denied, 348 U.S. 887. Accord: *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, 491; *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376, 380; *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 134; *N.L.R.B.* v. *Merner Lumber & Hardware Co.*, 345 F. 2d 770, 771 (C.A. 9), cert. denied, 382 U.S. 942; *N.L.R.B.* v. *Deutsch Co.*, 265 F. 2d 473, 478 (C.A. 9), cert. denied, 361 U.S. 963; *N.L.R.B.* v. *Service Parts Co.*, 209 F. 2d 905, 907 (C.A. 9); *S. D. Warren Co.* v. *N.L.R.B.*, 353 F. 2d 494, 497-498 (C.A. 1), cert. denied, 383 U.S. 958; *N.L.R.B.* v. *Checker Cab Company*, 367 F. 2d 692, 697-698 (C.A. 6), cert. denied, 385 U.S. 1008; *Retail, Wholesale, and Department Store Union* v. *N.L.R.B.*, 66 LRRM 2158, 2161, 56 L.C. para. 12,168 (C.A.

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[19] The pertinent text of Section 9(b) appears in the Statutory Appendix, *infra*, p. 73.

D.C.), Sept. 14, 1967). We show below that the Board's unit determination was neither arbitrary nor capricious but, rather, was a reasonable exercise of its broad discretionary authority.

A. *The Board reasonably determined that K-Mart and its licensees are joint employers*

As more fully set forth in the Counterstatement, *supra*, at pp. 6-10, and in the Regional Director's decision and direction of elections (R. 14-22), K-Mart's Commerce store includes several departments which are operated by licensees pursuant to uniform written agreements with K-Mart. The licensed departments operate as integral parts of the store, and to customers are identifiable only as departments of the K-Mart store. Under the uniform license agreement, K-Mart controls advertising, merchandising, and the physical arrangement of the store. K-Mart retains the right to audit the licensees' sales records; to handle all complaints, exchanges and refunds through its own service desk; and to control credit. The license agreement also requires licensees to comply with all local, state and Federal regulations, and more particularly those statutes which pertain to workman's compensation, and employee health and welfare benefits. Recognizing that the success of their "enterprise is dependent upon compliance with common standards," K-Mart and its licensees have agreed to conduct their business in accordance with Rules and Regulations, "as established from time to time by the Licensor" (*supra*, pp. 7-8). K-Mart's ultimate power is established by Paragraph 10 of the license agreement. Under its provisions, K-Mart alone has au-

thority to issue uniform Rules and Regulations "for the benefit of the common enterprise", and to amend, modify or revise them (*supra*, p. 8). Such Rules are to "govern," *inter alia*, "employment practices" and "personnel * * * policies." Violation of these Rules and Regulations subjects the offending licensee to termination of its license by K-Mart (Er. X. 1, p. 7).

Pursuant to its authority under the licensing agreement, K-Mart has promulgated Rules and Regulations under which K-Mart enjoys over-all control of the store's operations. These Rules include provisions relating to hiring and terminations, employee discipline, employee wearing apparel and identification badges, places where employees could keep purses and extra clothing, smoking, rest periods, and employee purchases. Licensees are required to operate their departments with "sufficient help" during hours established by K-Mart, which has thus substantially limited the licensees' power to vary or curtail its employees' working hours. Although all hiring and terminations are under the supervision of the licensees' managers, the Rules and Regulations authorize K-Mart's personnel supervisor to receive applications from persons seeking employment at the Commerce store, and to make such applications available to licensees upon their request. K-Mart and each licensee have also agreed to check with each other before hiring a present employee or former employee of the other. If K-Mart's manager determines that a licensee's employees are "inefficient or objectionable," the licensee must comply with the manager's "suggestion

for a correction of the condition" (R. 15; R. Tr. 235, Er. X. 2, p. 2). Finally, licensees are directed to "Not permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operations of other Licensees or Licensors" (*supra*, pp. 8-9).

In brief, K-Mart and its licensees have recognized the necessity for coordinated control of their "common enterprise," and have expressly provided for such control in their licensing agreement. Paragraph 10 of the licensing agreement vests K-Mart with broad over-all authority to promulgate uniform Rules and Regulations covering all aspects of the Commerce store's operation, specifically including labor relations. As we have shown, K-Mart has already exercised its authority with respect to a number of employment conditions within the area of mandatory collective bargaining.[20] Moreover, K-Mart's broad au-

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[20] Thus, working hours and work days are mandatory subjects of collective bargaining (*Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO* v. *Jewel Tea Co.*, 381 U.S. 676, 691). Under the current Rules and Regulations, licensees are required to operate their departments during hours established by K-Mart (Er. X. 2, p. 2). It also appears that K-Mart operates the Commerce store on Sundays (K-Mart Br. pp. 43-44).

Similarly, employee work loads are a mandatory subject of bargaining (*N.L.R.B.* v. *Bonham Cotton Mills, Inc.*, 289 F. 2d 903, 904 (C.A. 5)). Under K-Mart's Rules and Regulations, K-Mart may prescribe the number of employees it deems necessary to operate a licensee's department (Er. X. 2, p. 2).

Moreover, hiring practices and tenure of employment may be mandatory subjects of collective bargaining (*N.L.R.B.* v. *Houston Chapter, Associated General Contractors of America,*

thority to "amend, modify or revise" the current Rules and Regulations with respect to employment conditions empowers it to withhold or nullify the licensees' power to obligate themselves during bargaining with the Union about such matters. Finally, K-Mart has directed its licensees to settle labor disputes which interfere with the operation of the Commerce store. When coupled with K-Mart's right to terminate the license of a disobedient licensee, K-Mart's rule-making power, both exercised and potential, would preclude the Union from safely relying on bargaining commitments by the licensees so long as K-Mart remained free from the statutory bargaining obligation which the Board has imposed on it. In these circumstances, we submit, the Board's finding that K-Mart and its licensees are joint employers can hardly be deemed arbitrary or capricious. *N.L.R.B.* v. *Checker Cab Company*, *supra*, 367 F. 2d at 696-698; *N.L.R.B.* v. *S. E. Nichols Company*, 380 F. 2d

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349 F. 2d 449, 451-452 (C.A. 5), cert. denied, 382 U.S. 1026; *N.L.R.B.* v. *Tom Joyce Floors, Inc.*, 353 F. 2d 768, 769-771 (C.A. 9)). Under the Rules and Regulations, neither K-Mart nor a licensee can hire an employee or former employee of the other without first checking with the latter (Er. X. 2, p. 1).

Finally, company rules concerning coffee breaks, lunch periods, smoking, employee discipline, and dress are mandatory bargaining subjects (*Winter Garden Citrus Products Cooperative* v. *N.L.R.B.*, 238 F. 2d 128, 129 (C.A. 5), enforcing in this respect 114 NLRB 1048, 1060-1065; *Lloyd Fry Roofing Co.* v. *N.L.R.B.*, 216 F. 2d 273, 274, 276 (C.A. 9)). K-Mart's Rules and Regulations contain provisions governing these and other similar working conditions for all employees at the Commerce store.

438, 439 (C.A. 2).[21] On the contrary, the Board's decision merely recognized the pattern established by the Employers. In sum, the Board has recognized that K-Mart is a necessary participant in any collective bargaining which may affect the terms and conditions of employment enjoyed by its licensees' employees at Commerce. Having created this arrangement, the Employers cannot now dispute the industrial realities which flow from it.

The Employers' contention (K-Mart Br. 20-23, Gallenkamp Br. 25-27, Hollywood Br. 13) that the Board's order requiring them to bargain with the Union as joint employers will have a highly disruptive effect upon the store's operation is without any support in the record. Compare *N.L.R.B.* v. *Mead Foods, Inc.*, 353 F. 2d 87 (C.A. 5) in which the Fifth Circuit rejected speculation as to "asserted practical difficulties which may arise from having to bargain with two locals rather than one;" see also, *Pacific Coast Assn. of Pulp and Paper Mfrs.* v. *N.L.R.B.*, 304 F. 2d 760, 765-766 (C.A. 9). Moreover, it is reason-

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[21] For similar Board findings of joint-employers in representation proceedings, see *Frostco Super Save Store, Inc.*, 138 NLRB 125, 126-128; *United Stores of America and Collins Mart, Inc.*, 138 NLRB 383, 384-385; *Spartan Department Stores*, 140 NLRB 608, 609-610; *K-Mart, A Division of S. S. Kresge Company*, 159 NLRB No. 28 (where the petition covered K-Mart's San Fernando, California, store, and the parties stipulated (159 NLRB No. 28, n. 3) that the record made in the representation proceeding now before the Court in the instant case correctly represented the facts insofar as they were pertinent to the San Fernando K-Mart) ; *Thriftown, Inc.*, 161 NLRB No. 42; *K-Mart Division of S. S. Kresge Company*, 161 NLRB No. 92; *Jewel Tea Co., Inc.*, 162 NLRB No. 44.

able to expect that the Employers' accommodation of their diverse business policies to meet the needs of their joint enterprise, as is embodied in the uniform license agreement, would find its parallel in their bargaining with the Union. Contrary to the suggestion of the Employers (except K-Mart) (Gallenkamp br. p. 26, Hollywood br. p. 12 n. 1), the Board's finding that they are joint employers for collective bargaining purposes does not imply that they are all automatically answerable for other unfair labor practices (such as discriminatory discharges) which one of them may commit solely in furtherance of its own ends. See, *Majestic Molded Products, Inc.* v. *N.L.R.B.*, 330 F. 2d 603, 607 (C.A. 2).

In support of their contention that K-Mart and its licensees are not joint employers, the Employers rely upon those facts which appear to show separate supervision and control of working conditions for their own employees (K-Mart, Br. 32-38, Gallenkamp Br. 16-25; Hollywood Br. 13). From those facts, the Employers argue the applicability here of cases[22] in which, because of the absence of control by the licensor of the licensee's labor relations or employment conditions, the Board has refused to make a joint-employer finding. However, as is evident from the foregoing discussion of the license agreement and the Rules and Regulations which govern the working conditions and labor relations in the licensed departments here, those cases are inapposite.

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[22] *Esgro Anaheim, Inc.*, 150 NLRB 401; *Bab-Rand Co.*, 147 NLRB 247; *S.A.G.E., Inc. of Houston*, 146 NLRB 325.

B. ***The determination that a store-wide unit of the employees at K-Mart's Commerce store, including the employees of F & G Merchandising, constituted an appropriate bargaining unit was a reasonable exercise of discretion***

As shown above, at p. 7, K-Mart's Commerce store resembles a single, integrated department store. Further, K-Mart and its licensees, including F & G Merchandising, constitute joint employers of the licensees' departments. Moreover, there is no bargaining history for any of the employees, and no other labor organization seeks to represent the employees of F & G or of any other licensee separately (R. 16). These conditions, standing alone, point to the propriety of the store-wide unit.[23]

The Employers (except K-Mart) contend, however, that the automotive mechanics and service employees, comprising F & G Merchandising's department, should be excluded from the unit because they lack sufficient community of interest with other unit employees (Gallenkamp Br. 27-30; Hollywood Br. 13). In support of their position, the Employers point to a variety of factors, including differences in function and conditions of employment between F & G's employees and the employees of the other departments; the uniforms which set F & G's employees apart; and the separate lounge and toilet facilities used by F & G's employees (Gallenkamp Br. 27; Hollywood Br. 13). Although the factors urged by the Employers

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[23] See, e.g., *Thrifttown, Inc.*, 161 NLRB No. 42; *Jewel Tea Co., Inc.*, 162 NLRB No. 44; *K-Mart Division of S.S. Kresge Company,* 161 NLRB No. 92; *Montgomery Ward & Company,* 78 NLRB 1070.

suggest that a separate unit of automotive mechanics and service employees might also be appropriate,[24] no labor organization seeks to represent such a unit separately. In these circumstances, the determination that a storewide unit constituted an appropriate unit conformed to the Board's long established policy in cases involving retail department stores. See e.g., *Stern's Paramus*, 150 NLRB 799, 803; *J. W. Mays, Inc.*, 147 NLRB 968, 972; *Polk Brothers, Inc.*, 128 NLRB 330, 331; *May Department Stores Company, Kaufmann Division*, 97 NLRB 1007, 1008. Thus, under this policy, the Board has treated a retail department store as a "plant unit" within the meaning of Section 9 of the Act, *supra.*[25]

This longstanding Board policy is, we submit, fully responsive to the statutory command in Section 9(b) that the Board make its appropriate-unit determinations "in order to secure to employees the fullest freedom in exercising the rights guaranteed by [the Act] . . . ." Thus, where, as here, no other labor organization seeks to represent F & G's employees sepa-

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[24] See, e.g., *Montgomery Ward & Co., Incorporated,* 150 NLRB 598; 601; *Bamberger's Paramus,* 151 NLRB 748, 751.

[25] The Board has long recognized the presumptive appropriateness of a single-plant unit. *Beaumont Forging Co.,* 110 NLRB 2200, 2201-2202; *Fredrickson Motor Express Corp.,* 121 NLRB 32, 33; *Temco Aircraft Corp.,* 121 NLRB 1085, 1088, n. 11; *Dixie Belle Mills, Inc.,* 139 NLRB 629, 631; *Liebmann Breweries, Inc.,* 142 NLRB 121, 125. See, *Sav-on Drugs, Inc.,* 138 NLRB 1032, 1033. See also, *e.g., N.L.R.B.* v. *Schill Steel Products,* 340 F. 2d 568, 574 (C.A. 5); *Harris Langenberg Hat Co.* v. *N.L.R.B.,* 216 F. 2d 146, 147-148 (C.A. 8).

rately, the Board could reasonably believe that this "fullest freedom" would not be promoted by barring such a group from joining with all the other store employees in exercising the right to select a collective bargaining representative. Indeed, were the Board to exclude F & G's employees from the unit, it is a matter of speculation as to whether any labor organization would undertake to represent such a residual group separately.[26] In view of these considerations, the determination that the store-wide unit was appropriate lies well within the Board's discretion.[27] *Cf.*

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[26] The Employers (except K-Mart) argue that the inclusion of F & G's employees in the store-wide unit conflicts with a line of Board cases which hold that separate units of automotive service departments are appropriate (Gallenkamp Br. pp. 28-30). However, in each of the cases cited by the Employers, a labor organization sought to represent such a department apart from other store employees. That such a fraction of the store-wide unit would itself constitute an appropriate bargaining unit does not detract from the validity of the broader unit, which is also an appropriate unit. *N.L.R.B.* v. *Smith*, 209 F. 2d 905, 907 (C.A. 9); *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 405 (C.A. 9), cert. denied, 348 U.S. 887; *N.L.R.B.* v. *Quaker City Life Insurance Company*, 319 F. 2d 690, 693 (C.A. 4); *Mountain States Telephone and Telegraph Co.* v. *N.L.R.B.*, 310 F. 2d 478, 480 (C.A. 10), cert. denied, 371 U.S. 875; *N.L.R.B.* v. *Charles Smythe, et al.*, 212 F. 2d 664, 667-668 (C.A. 5); *Harris Langenberg Hat Company* v. *N.L.R.B.*, 216 F. 2d 146, 148 (C.A. 8); *Mueller Brass Company* v. *N.L.R.B.*, 180 F. 2d 402, 405 (C.A. D.C.). *Cf. Georgia-Pacific Corporation*, 156 NLRB 946, 949-950.

[27] Thus, though the courts may feel that other election policies would "best effectuate" the controlling statute, the agency's choice of policies is entitled to affirmance as long as "there is nothing to suggest that in framing [them] the Board has exceeded its statutory authority." *Brotherhood of Rail-*

N.L.R.B. v. *Checker Cab Co.*, 367 F. 2d 692, 696-697 (C.A. 6), cert. denied, 385 U.S. 1008.

II. The Board Properly Found That R. Pentecost Was Ineligible to Vote in the Election of April 7, 1965

The validity of the Board's certification that the Union received a majority of the votes cast in the representation election rests upon the propriety of the Regional Director's determination that R. Pentecost, whose unopened ballot is sufficient to affect the results of the election,[28] was ineligible to vote. Questions of eligibility are basically factual, and it is well settled that the Board's determinations of factual disputes in the resolution of questions of representation are not to be disturbed if supported by substantial evidence. *N.L.R.B.* v. *Atkinson Dredging Company*, 329 F. 2d 158, 160 (C.A. 4), cert. denied, 377 U.S. 965; *N.L.R.B.* v. *Belcher Towing Company*, 284 F. 2d 118, 120 (C.A. 5); *Scobell Chemical Company* v. *N.L.R.B.*, 267 F. 2d 922, 924 (C.A. 2). As shown below, the evidence fully supports the Board's conclusion that R. Pentecost was ineligible to vote.

In accordance with Board practice,[29] the Regional

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way & Steamship Clerks, etc. v. *National Mediation Board*, 380 U.S. 650, 671. Accord: *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 332. See also, *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-621.

[28] As noted above, at pp. 22-23, the Revised Tally of Ballots shows that of 75 valid ballots counted, 38 were for and 37 were against the Union.

[29] See e.g., *B-W Construction Company*, 161 NLRB No. 146; *R. B. Butler, Inc.*, 160 NLRB No. 131. The Board's practice is guided by its desire to obtain a payroll, "which most

Director in his Direction of Elections, dated February 24, 1965, and in the subsequent notice of election, selected F & G's payroll covering the period immediately preceding that date as the basis for determining eligibility to vote. F & G's payroll period ran from Thursday to Wednesday. As February 24 was the last day of F & G's payroll period, the Regional Director followed the Board's usual procedure of selecting the first full payroll period before the date of a direction of election. *S. S. Kresge Company*, 121 NLRB 374, 385. Thus, to be eligible to vote in the election at the Commerce store, Pentecost must have been on F & G's Commerce payroll no later than Wednesday, February 17, 1965. *General Electric Company, supra*, 114 NLRB at 11; *Dura Steel Products Company*, 111 NLRB 590, 593. Cf. *Active Sportswear Co., Inc.*, 104 NLRB 1057. However, as shown in the Counterstatement, *supra* at p. 13, Pentecost was hired on February 1, 1965, at F & G's Costa Mesa location as a mechanic to be trained for later employment at F & G's Commerce store. It is conceded that Richard Wall, F & G's manager at Commerce, first assumed his duties at the Commerce store on February 18, 1965; and that Pentecost worked at the Costa Mesa store on February 17 and did not report for work at Commerce until Friday, February 19, 1965, when his name first appeared on F & G's Commerce payroll. Not until April 30, 1965,

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accurately list[s] the employees whose interests are involved, to serve as the basis for determining eligibility to vote." *General Electric Company*, 114 NLRB 10, 11-12.

over three weeks after the election, did F & G charge Pentecost's Costa Mesa wages to its Commerce operation. On the foregoing facts, the Board properly concluded that Pentecost was ineligible to vote in the representation election at the Commerce store.

Relying primarily upon the Board's decisions in *Rohr Aircraft Corporation*, 104 NLRB 499; and *Johnson City Foundry and Machine Works, Inc.*, 75 NLRB 475, the Employers (except K-Mart) argue that Pentecost's eligibility was established by F & G's intent to employ him at the Commerce store; his training status while at the Costa Mesa store; and the charging of Pentecost's wages, while at Costa Mesa, to F & G's Commerce operations (Gallenkamp Br. 32-33; Hollywood Br. 13). However, the Employers' reliance upon those decisions is misplaced. In *Rohr*, the Board found that certain employees were eligible to vote in a unit of the Company's Riverside plant employes because "employees on the payroll of the Riverside plant were training at the [Company's] Chula Vista plant . . . for jobs at the former plant. Their training assignment, if not already completed, is in the nature of a temporary detail." 104 NLRB at 502. Similarly, in *Johnson City* the Board found an employee eligible to vote where he was on the unit payroll and was on a temporary training detail outside the unit. 75 NLRB at 479.[30] However, those

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[30] The Employers (except K-Mart) also seek support for their contention in *American Cyanamid and Chemical Corp.*, 11 NLRB 803, 806; *Great Lakes Steel Corp.*, 15 NLRB 510, 512; *Walton Lumber Co.*, 20 NLRB 573, 576; *Armour & Co.*, 15 NLRB 268, 279; *Quick Industries, Inc.*, 71 NLRB 949,

cases do not govern here. For, in the instant case, Pentecost was never employed at F & G's Commerce location nor included on its payroll until two days after the eligibility date. Further, the accounting entry transferring the charges for Pentecost's wages from F & G's Costa Mesa store to the Commerce store was not made until April 30, 1965, twenty-three days after the election (R. 155). Finally, neither Pentecost's training status, nor F & G's intent, nor its *post hoc* accounting entries, alter the determinative fact that Pentecost was neither employed at F & G's Commerce operation, nor listed on its Commerce payroll on February 17, 1965, the eligibility date properly fixed by the Regional Director's Direction of Elections.

III. The Board Reasonably Exercised Its Discretion in Finding That the Employers' Objections Did Not Warrant Setting Aside the Election

A. *Controlling Principles*

As the Seventh Circuit pointed out in *Rockwell Mfg. Co., Kearney Div.* v. *N.L.R.B.*, 330 F. 2d 795, 796-797, cert. denied, 379 U.S. 890:

950; and *E. J. Kelley Co.*, 99 NLRB 791, 792-793. However, such reliance is misplaced. For, in each of the cited cases, except *Walton*, the Board held that employees who were on the company's payroll, but were temporarily assigned to work outside the voting unit on the eligibility cut-off date, were eligible to vote. As for *Walton*, the Board in that case held that employees who had been temporarily removed from the company's payroll and transferred to work for another employer were in effect temporarily laid-off and thus eligible to vote.

> Whether to set aside an election because of incidents during the campaign period is a matter for the sound discretion of the Board. As has been frequently remarked: * * * 'Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.' *N.L.R.B.* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226 . . . ; *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330 . . . .

Accord: *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482; *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 409 (C.A. 9), cert. denied, 348 U.S. 887; *Department & Specialty Store Emp. Union, Local 1265, RCIA* v. *Brown*, 284 F. 2d 619, 627 (C.A. 9), cert. denied, 366 U.S. 934. The only question for the courts is whether the Board reasonably exercised its discretion. *N.L.R.B.* v. *J. R. Simplot Company*, 322 F. 2d 170, 172 (C.A. 9); *International Tel. & Tel.* v. *N.L.R.B.*, 294 F. 2d 393, 395 (C.A. 9); *Neuhoff Brothers Packers, Inc.* v. *N.L.R.B.*, 362 F. 2d 611, 614 (C.A. 5), cert. denied, 386 U.S. 956; *Olson Rug Company* v. *N.L.R.B.*, 260 F. 2d 255, 256 (C.A. 7). As the Court further noted in *Rockwell, supra* at 797:

> The Board has always considered it a question of degree whether the conduct revealed by the record is so glaring as to impair the employees' freedom of choice, necessitating a new election. *General Shoe Corp.*, (1948) 77 NLRB 124, 126.
>
> Each incident must be considered in the light of the precise circumstances of a particular case,

> having reference to the timing, proportion of employees affected, and the character of the threat.

The burden, moreover, is on the party urging that an election be voided to overcome the "strong presumption that the ballots cast in secrecy under the safeguards regularly provided by [Board] procedures, reflect the true desires of the participating employees." *Maywood Hosiery Mills, Inc.*, 64 NLRB 146, 150. See *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124; *N.L.R.B.* v. *National Survey, Inc.*, 361 F. 2d 199, 207-208 (C.A. 7); *N.L.R.B.* v. *Zelrich Co.*, 344 F. 2d 1011, 1015 (C.A. 5); *Liberal Market, Inc.*, 108 NLRB 1481, 1482. We demonstrate below that the Employers have not shown that the "impair[ment of] the employees' freedom of choice" here was "so glaring" as to warrant the conclusion that the Board abused its discretion in refusing to set aside the election.[31]

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[31] In response to the Employers' contention before the Board that their objections raised substantial and material issues of fact which warranted a hearing, the Board, in its Decision and Order, declared (R. 325):

> In determining upon the requests for review whether the Employers' objections raised substantial and material issues of fact, the Board in accordance with its usual practice viewed the evidence in a light most favorable to the Employer-objectors and did not rely on any "credibility resolutions." Thus, the Board assumed the accuracy of the allegations of objectionable conduct as reported by the Employers' witnesses, and concluded that this conduct, if it happened as alleged, would be insufficient to warrant setting aside the election. Accordingly, the Board decided that a hearing was not necessary and that

B. *The Board properly overruled the Employers' objections based on the alleged threats of economic and other reprisals*

As shown in the Counterstatement, the first two of the Employers' six objections alleged that the Union's pre-election campaign was marked by threats which created an atmosphere of fear sufficient to impair the fairness of the election. In the first of these two objections, the Employers alleged that the Union interfered with the conduct of the election by threatening K-Mart's employees with loss of employment if they did not join or support the Union (*supra* pp. 13-14). In support of this objection, the Employer relied on two alleged incidents. In the first, a Union representative told an employee "If you don't join and the Union is voted in, you will lose your job" (*supra* p. 14). A reasonable interpretation of this statement was, as indicated by the Regional Director's investigation,[32] merely an over-simplified prediction of what would happen *if* the Union were voted in, and *if* it succeeded in its bargaining for a union-security clause in its contract. Thus, the statement related

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the objections were properly overruled. We here reaffirm the aforesaid ruling.

In light of the Board's declaration, the Employers concede that the question of whether or not a hearing on objections should have been granted is not before this Court (K-Mart Br. 65).

[32] As shown in the Counterstatement, *supra*, p. 14, the Union's representative told employees that the Union's contracts contained union security clauses requiring membership in the Union after thirty days' employment, as a condition of employment.

only to union membership and was not conditioned upon whether the employee voted for the Union or not. Moreover, such disclosure by a union before an election, far from confusing or coercing an employee into voting for the union, would tend to encourage him to vote against the union. Thus, the Board properly rejected this incident as basis for sustaining the Employers' first objection. *A.R.F. Products, Inc.*, 118 NLRB 1456, 1458-1459; *Otis Elevator Company*, 114 NLRB 1490, 1493.

In the second incident, a K-Mart employee reported a telephone conversation on March 16 with an unidentified person, who stated that he was a "union representative" and warned her that the Union was going to "get in" and that if she did not vote for it, she would not have her job long. Aside from the caller's ambiguous assertion that he was a "union representative", there is no evidence that this remark was attributable to the Union. Nor is there evidence that this threat was communicated to other employees. Under the circumstances, the Regional Director was warranted in concluding that this remark was insufficient to create an atmosphere of fear and reprisal. *Orleans Mfg. Co.*, 120 NLRB 630, 633-634; *Allied Plywood Corp.*, 122 NLRB 959, 961; *Pittsfield Shoe Corp., Inc.*, 119 NLRB 1067, 1068; *A.R.F. Products, Inc., supra* at 1458; *Macomb Pottery Company* v. *N.L.R.B.*, 376 F. 2d 450, 454 (C.A. 7); *Shoreline Enterprises* v. *N.L.R.B.*, 262 F. 2d 933, 942 (C.A. 5); *N.L.R.B.* v. *MYCA Products*, 352 F. 2d 511, 512 (C.A. 6); *Rockwell Mfg. Co., Kearney Div.* v. *N.L.R.B.*, *supra* at 797; *Manning, Maxwell, & Moore,*

Inc. v. *N.L.R.B.*, 324 F. 2d 857, 858 (C.A. 5). Further, assuming the Union were responsible for the telephoned threat, the statement did not impair the employee's free choice. For the Board could reasonably credit the employee with the good sense to recognize that the predicted economic reprisal could not be effectuated without K-Mart's acquiescence and cooperation.[33] *Otis Elevation Company*, 114 NLRB 1490, 1493; *Bender Playground Equipment, Inc.*, 97 NLRB 1561, 1562; *Rio De Oro Uranium Mines, Inc.*, 120 NLRB 91, 94; *Kresge-Newark, Inc.*, 112 NLRB 869, 871. Certainly, the anti-union pre-election speech of March 31, 1965, delivered by K-Mart to its employees, including a statement that voting would be by secret ballot (R. 157; 168) was sufficient to dispel any fear that the threat could be carried out. *Shoreline Enterprises* v. *N.L.R.B.*, *supra*, at 942; *Bender Playground Equipment, Inc.*, *supra; General Electric Co.* v. *N.L.R.B.*, 66 LRRM 2262, 2264, 56 L.C. para. 12198 (C.A. 4, Sept. 20, 1967).

The Employers' second objection alleges that the Union impaired the election by threatening employees with physical violence and other reprisals (*supra*, at p. 14), and by subjecting employees to surveillance. The Employers sought to support this objection by evidence that the Union had threatened and coerced

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[33] Far from being intimidated, the employee told the caller "that he seemed pretty sure of himself" and then ended the discussion by telling him that her father was waiting for her and she "could not talk any longer" (R. 241).

employee Leo Hosey (R. 242-249).[34] Such evidence consisted of testimony that Hosey had told his supervisors that he had been threatened, and the testimony of Michael Castanon, a fellow employee, that he overheard the threat (R. 242-246). According to Castanon, after Hosey refused to accept literature from a Union representative and admonished him to stop visiting his home, the representative replied, "You we don't want. You'd better hope the Union doesn't get in." In contrast, Hosey, in his affidavit, denied that he had been threatened, and reported that a union representative had visited his home once, prior to the alleged threat, and on a second occasion, on the day before the election (R. 158). However, assuming the accuracy of Castanon's version, the Union representative's statement would appear to constitute an inducement to vote *against* the Union, not for it.

As noted *supra*, pp. 47-48, threats which create a general atmosphere of fear and reprisal, rendering a free election impossible, warrant setting aside an election whether or not the misconduct is attributable to the parties in whole or in part. See *N.L.R.B.* v. *Trancoa Chemical Corp.*, 303 F. 2d 456, 461 (C.A. 1); *Diamond State Poultry Co.*, 107 NLRB 3, 6. The Board properly refused to find that the evidence of the reported threats in the instant case added up to create such a "general atmosphere." For, as we have shown, the impact of each of the three alleged re-

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[34] As shown in the Regional Director's Supplemental Decision, there was no evidence of surveillance by the Union (R. 158).

marks was limited to one employee in the unit of 80 voters, and a fourth employee, Castanon, who overheard one of them. Finally, it is difficult to conceive that such antagonizing conduct would have induced any of the four employees involved to vote for the Union. Under these circumstances, the Board was not required to set aside the election. *Macomb Pottery Company* v. *N.L.R.B.*, *supra*, 376 F. 2d at 454. See *Rockwell Mfg. Co., Kearney Div.* v. *N.L.R.B.*, *supra*, 330 F. 2d at 797; *Shoreline Enterprises* v. *N.L.R.B.*, *supra*, 262 F. 2d at 942. Compare *Home Town Foods, Inc.* v. *N.L.R.B.*, 379 F. 2d 241, 243-244 (C.A. 5).

C. *The Board properly overruled the Employers' objections based upon the Union's pre-election propaganda*

1. *The alleged misrepresentations*

The Employers contend in their objections 3, 4 and 6 (*supra* pp. 15-19), that the Union made various misrepresentations which impaired the employees' freedom of choice in the election. As we now show, the Board's rejection of these contentions was clearly a proper exercise of its wide discretion.

The Board's rules regarding campaign misrepresentations distinguish between "a substantial departure from the truth . . . [which] may reasonably be expected to have a significant impact on the election" and, on the other hand, those "ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts [which] frequently occur in communications between

persons." *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 224. With respect to the latter, the Board's policy is to trust the common sense of the electorate to evaluate and fairly discount such utterances. Indeed, the American voter's exposure to the hyperbole and inaccuracies which characterize our political campaigns has surely imbued the electorate with a healthy skepticism of all campaign propaganda. As the Seventh Circuit has pointed out, "Prattle rather than precision is the dominating characteristic of election publicity." *Olson Rug Co.* v. *N.L.R.B.*, 260 F. 2d 255, 257.

Where campaign statements are grossly inaccurate or where the facts regarding matters of considerable significance in the campaign are distorted, and under the surrounding circumstances are likely to have substantial impact on an election, the Board will, of course, intervene to protect the integrity of its processes.[35] Thus, in evaluating the probable impact of a misstatement upon the election, the Board's considerations include whether "the party making the statement possesses intimate knowledge of the subject matter so that the employees sought to be persuaded may be expected to attach added significance to its assertion" and whether "the employees pos-

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[35] For cases where elections have been set aside by the Board for substantial campaign misrepresentations by either an employer or a union, see *Coca-Cola Bottling Company of Louisville*, 150 NLRB 397, 399-400; *Grede Foundries, Inc.*, 153 NLRB 984; *Hollywood Ceramics, supra; Steel Equipment Co.*, 140 NLRB 1158; *U.S. Gypsum Co.*, 130 NLRB 901; *Cleveland Trencher Co.*, 130 NLRB 600, 602-603.

sessed independent knowledge with which to evaluate the statements." *Hollywood Ceramics Company, Inc.*, *supra*, at 244. On the basis of these standards, the Board was warranted in finding that the Union's propaganda did not deprive the employees of a free choice in the election.

First, the Employers objected to the Union's leaflet, issued to employees on April 5 or 6, which compares wage rates in various job categories between K-Mart and similar stores under union contract (*supra*, p. 16). The Employers contended that the leaflet was false and misleading because it failed to state that the union rates were received by employees only after one year's employment, and further, because some K-Mart employees received more than the $1.80 which it depicted as K-Mart's hourly rate. However, as noted by the Regional Director and the Board, on March 26, the Union had mailed a leaflet to employees which reported the same union rates and the same classifications as were depicted in the later leaflet, and plainly stated that such rates applied only after "1 year of service" (R. 288; 159). Further, Food Giant and White Front each operated a store, under contract with the union, in the same Commerce shopping center where K-Mart was located (R. 288, 159).

In these circumstances, we submit that the Union's April leaflet did not contain any misstatement likely to have had any substantial impact upon the election. As the Regional Director noted, K-Mart's wage rates were not within the Union's special knowledge, but, rather, were matters about which K-Mart employees had independent knowledge. Further, as the Board

observed, the employees had previously been informed of the existence of a one-year experience qualification on union rates in the area, and could have resolved any doubt fostered by the April leaflet by inquiry of employees at nearby unionized stores. Thus, under its policy as stated in *Hollywood Ceramics* (*supra* at 244), the Board properly refused to invalidate the election in the face of inaccuracies which the employees could have readily evaluated. Accord: *Russell-Newman Manufacturing Co., Inc.*, 158 NLRB 1260 1261-1265, enf'd, F. 2d (C.A. D.C.) (Nos 20,217 and 20,415, decided April 12, 1967); *Anchor Manufacturing Company* v. *N.L.R.B.*, 300 F. 2d 301 303-304 (C.A. 5); *General Electric Co.* v. *N.L.R.B.* *supra*, 66 LRRM at 2264; *N.L.R.B.* v. *Allen Manufacturing Company*, 364 F. 2d 814, 816 (C.A. 6).

With respect to the inaccuracy found by the Board in the Union's leaflet, K-Mart and Hollywood Hat Co contend that the instant case is governed by the Board's decisions setting aside elections in *Hollywood Ceramics, supra; Ore-Ida Foods, Inc.*, 160 NLRB No 102; *The Cleveland Trencher Company, supra;* and Courts of Appeals' decisions nullifying Board-conducted elections in *United States Rubber Company* v *N.L.R.B.*, 373 F. 2d 602 (C.A. 5); and *Graphic Arts Finishing Co., Inc.* v. *N.L.R.B.*, 380 F. 2d 893 (C.A. 4) (K-Mart Br. 68-69, Hollywood Br. 13). We submit that the Board's reasonable conclusion that the Union's leaflet was free of substantial misstatements distinguishes the instant case from the Board cases upon which K-Mart and Hollywood Hat rely. For

in those cases, the Board found substantial misrepresentations which by their content, and the setting in which they were uttered, impaired the employees' free choice. To similar effect is *United States Rubber*, *supra*, where the Fifth Circuit, contrary to the Board, held, *inter alia*, that a union's assertion in pre-election propaganda that the employees were doing six days' work in "only five and getting paid for only five", if false, would be a substantial mistatement sufficient to impair the employees' free choice (373 F. 2d at 605). Similarly, in *Graphic Arts*, *supra*, the Fourth Circuit, in disagreement with the Board, held that a preelection union circular which exaggerated wages and fringe benefits, and another which misrepresented strike benefits paid by the union during a strike against another employer and falsely asserted that no striker had "lost a thing" by reason of the strike, "prevented the employees from registering their free and untrammeled choice as to a bargaining representative" (380 F. 2d at 896). Thus, to argue, as do K-Mart and Hollywood Hat, that the facts of this case fit squarely into the fact patterns found in other cases ignores substantial differences in the statements made by the unions and the context in which the statements were made. The question in this case, as in each case involving election campaign propaganda, is one of degree, dependent upon the precise circumstances found. For that reason, no case in which an election was or was not set aside is likely to be squarely in point. However, as we have shown, in the instant case the Board has properly applied its settled policy, approved by the courts, not to set aside

an election because of campaign misrepresentations unless it finds it likely that such utterances had a significant impact on the election. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60-61; *Olson Rug Co.* v. *N.L.R.B.*, 260 F. 2d 255, 257 (C.A. 7); *Anchor Mfg. Co.* v. *N.L.R.B.*, 300 F. 2d 301, 303 (C.A. 5); *Hollywood Ceramics Company, Inc., supra*, 140 NLRB at 224; cf. *Follett Corp.*, 160 NLRB No. 37.

The Employers' fourth objection alleged that the Union's pre-election letter to employees falsely declared that they would "not be required to pay double dues as some of the members have voluntarily voted to do" (*supra* pp. 17-18). To support their allegation, the Employers relied wholly upon a news article published in the Union's newspaper in March 1965, which merely reported that members of its Food, Drug and General Sales Division had voted to pay double dues to support a strike fund (R. 174). However, as the Regional Director noted, there was "nothing in the letter which [was] contrary to the article . . ." (R. 160). Both the letter and the newspaper article agreed that a portion of the Union's membership had voted to pay double dues. However, there was nothing in the article to refute the Union's assertion that K-Mart store employees as new Union members would not be required to pay double dues. The burden of proving the falsity of the Union's assertion rested upon the Employers. *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124; *Anchor Manufacturing Company* v. *N.L.R.B.*, *supra*, 300 F. 2d at 303. Aside from the newspaper article, the Employers did not provide any evidence to support the allegation. We

submit, therefore, that the Regional Director properly overruled this objection.

In their sixth objection, the Employers alleged that on April 7, the day of the election "but prior to the time the polls opened, the Union . . . made false and misleading statements on material matters to one or more employees at the K-Mart location" (R. 161; 113-114). To support this allegation, the Employers furnished the statement of employee Carol Platteborze concerning a two-hour question-and-answer exchange between herself and two Union representatives on the morning of the election, which was held on her day off. According to Platteborze, that morning she received a telephone call from a Union representative who asked whether she intended to vote in the election that day and offered transportation for that purpose. Platteborze seized on this call as an opportunity to obtain answers to some questions she had rehearsed earlier with the K-Mart Assistant Store Manager Robinson, who had expressed interest in obtaining such answers from Union sources. Accordingly, at the end of the two-hour exchange, Platteborze recorded her recollection of her questions and the Union's answers, and gave this abstract to the interested assistant store manager later in the afternoon. There is no evidence that Platteborze related that morning's conversation to any employee. In these circumstances, any misrepresentations which the Union representatives may have made concerning the Union's strike record, the reinstatement rights of economic strikers, or any other matter could not have

had any effect upon the election. Platteborze questioned the Union's representatives, not as an employee whose decision to vote for or against the Union turned upon persuasive answers, but, rather, as one acting as a listening post for management. Thus aligned with management on the very morning of the election, it is unlikely that Platteborze would have been persuaded to change her position by any of the alleged misrepresentations attributed to the Union's representatives who called her at that juncture. Further, there is no evidence that any of the alleged misrepresentations received further publication before or after Platteborze furnished her report to Assistant Manager Robinson. In these circumstances, even if the Union made the alleged misrepresentations to Platteborze, they could have had no impact upon the election. Accordingly, the Board properly overruled this objection. *Hollywood Ceramics Company, Inc.*, *supra* at 224.

2. *The waiver of initiation fees*

As set forth above, p. 18, the Union told the employees that:

> It has always been the policy of our Organization that we do not charge initiation fees of any kind to any newly organized members. This policy will apply to any K-Mart employee who becomes a member of our Union as the result of our winning the election at your store and who is employed there at the time the employees sign their first Union contract.

The Board correctly concluded that this statement did not improperly influence the employees' votes.

The Board's conclusion in the instant case finds strong support in *Macomb Pottery Company* v. *N.L.R.B.*, *supra*, where the Union's pre-election propaganda included the following statement:

> The initiation fee is waved [sic] because all employees working . . . when the contract is signed will be charter members. No initiation fee for charter members.

Rejecting the company's contention that the union's promise of waiver invalidated the election, the Seventh Circuit held that "any persuasive effect the promised waiver may have on an individual employee in these circumstances is no different in kind from a statement of the amount of the dues or other representations of the advantages and burdens of membership." 376 F. 2d at 455. Similarly, the Second Circuit in *N.L.R.B.* v. *Edro Corp.*, 345 F. 2d 264, 268, found no impropriety in an exemption of all who join before a contract is signed, and declared:

> * * * This statement gave adequate notice to all employees, whether they approved or disapproved of the union, that they had nothing to lose by waiting for the union to achieve recognition before applying for membership.

Accord: *N.L.R.B.* v. *Gorbea, Perez & Morell, S. en Co.*, 328 F. 2d 679, 682 (C.A. 1); *N.L.R.B.* v. *Taitel*, 261 F. 2d 1, 4 (C.A. 7), cert. denied, 359 U.S. 944. Thus, the Board's conclusion in the instant case finds ample approval in judicial precedent.

N.L.R.B. v. *Gilmore Industries, Inc.*, 341 F. 2d 240 (C.A. 6) is distinguishable from the instant case.

The court there found that the union misled employees into believing "that the waiver of initiation fees amounted to a benefit of three hundred dollars if the union won the election" instead of "tell[ing] the truth, namely, that its initiation fee was six dollars and not three hundred dollars." *Id.* at 242. Here, the Union did not misrepresent the value of the waiver. To the extent that *Gilmore* may question every waiver like the one at bar, where an employee may refuse to join the union before an election and still benefit by the waiver if the union wins, we submit that *Gilmore* is inconsistent with the decisions of the First, Second, and Seventh Circuits, cited above. Indeed, the First Circuit expressly approved the Board's decision in *Gilmore*. *N.L.R.B.* v. *Gorbea, Perez & Morell, S. en C.*, *supra* at 682.

Further, as the Regional Director noted, *Lobue Bros.*, 109 NLRB 1182, is distinguishable from this case. There, the union solicited employee signatures on cards entitling the signer "to a membership book free of initiation fee 'after election and certification . . .' hence conditioned upon petitioner's winning the elections." Employees who signed cards before the election were in fact given membership books containing the waiver. The Board concluded that, in these circumstances, the employees would be likely to regard the waiver as the *quid pro quo* for their votes, and hence, set the election aside. In the instant case, unlike *Lobue*, the waiver was not conditioned upon how the employee voted in the election, but was available to anyone employed at the time the Union en-

tered into a collective-bargaining agreement with the Employers.

In any event, the Board recently reexamined the principles underlying its *Lobue* decision and overruled that case, in *Dit-MCO, Incorporated*, 163 NLRB No. 147 (decided April 12, 1967). The Board concluded that "waivers, or provisional waivers, of union initiation fees, whether contingent upon the results of an election or not have no improper effect on the freedom of choice of the electorate, and do not constitute a basis for setting aside an election." *Id.* at 7. In formulating its conclusion, the Board made the following observations, which are particularly applicable to the instant case (*Id.* at pp. 5-6):

> . . . employees who have received or been promised free memberships will not be required to pay an initiation fee, *whatever the outcome of the vote.* If the Union wins the election, there is by postulate no obligation; and if the union loses, there is *still no obligation,* because compulsion to pay an initiation fee arises under the Act only when a union becomes the employees' representative and negotiates a valid union-security agreement. Thus, whatever kindly feeling toward the union may be generated by the cost-reduction offer, when consideration is given only to the question of initiation fees, it is completely illogical to characterize as improper inducement or coercion to vote "Yes" a waiver of something that can be avoided simply by voting "No." (Emphasis in original.)

IV. The Board Properly Found That the Employers' Refusal to Bargain With the Union Violated Section 8(a)(5) and (1) of the Act

As we have shown, *supra* pp. 23, 32-63, on September 9, 1965, the Board properly certified the Union as the collective bargaining representative of a store-wide unit of selling, nonselling, and office clerical employees at K-Mart's Commerce store. Thereafter, on September 21, and again, on October 19, 1965, the Union requested K-Mart to meet with it for the purpose of collective bargaining (*supra* pp. 23-24). K-Mart refused both requests. Gallenkamp, Mercury, Acme, F & G and Hollywood also refused the Union's requests that they meet with it for contract negotiations. We submit that the Board properly found that by such refusals to bargain, the Employers violated Section 8(a)(5) and (1) of the Act.

Aside from its contentions regarding the appropriateness of the unit and the validity of the election, Hollywood Hat Co. seeks to justify the Employers' refusal to bargain on the grounds that the certification, the Union's demand for bargaining, the amended charge and the complaint were defective (Hollywood Br. 3-13). More particularly, Hollywood contends that the certification was invalidated by the inclusion of Besco and the exclusion of Zale, allegedly an indispensable party; and that the Union's demand for recognition and bargaining, the amended charge, and the complaint were defective because they named Besco as a joint employer, although Besco had ceased doing business at the Commerce store. Hollywood also contends that the Union's demand for recognition and

bargaining was defective as it did not demand that K-Mart and its licensees bargain jointly. We submit that the Board properly rejected these contentions.

As shown in the Counterstatement, *supra* p. 24, Besco ceased its business activity at the Commerce store eight days prior to the April 7, 1965 election. Further, at some time between the election and the Board's certification on September 9, 1965, Zale began operations at the Commerce store. However, the Board had received no formal word of these changes at the time it issued its certification (R. 325; C. Tr. 23, 30-33).[36] Further, the Union was not apprised of

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[36] Compare *K-Mart, A Division of S.S. Kresge, et al.*, 163 NLRB No. 88 (relied on by Hollywood, br. pp. 8-9). In that case, which involved the K-Mart store at San Fernando, California, the Board had directed an election (159 NLRB No. 28) finding that K-Mart, Gallenkamp and Mercury were joint employers of the employees in the licensed departments, and describing the unit as "employees of K-Mart, Mercury, and Gallenkamp." However (unlike the instant case), before the election was held, the Board was administratively advised that a new licensee, Holly Stores, Inc., had commenced operations at the store sometime after the Board's decision issued. Accordingly, the Board issued an order noting the existence of Holly at the store and amending its unit description to read, generally, "employees of K-Mart and those of its licensees," without specifically naming the licensees. Thereafter, still before the election, Holly filed an objection to its implicit inclusion in the unit without notice and a hearing. After the election, in which (unlike the instant case) Holly's employees voted by challenged ballot, and after the issuance of a show-cause order by the Board requesting that Holly come forward with facts distinguishing its relationship with K-Mart from that of the other licensees, the Board, upon Holly's reiteration of its earlier objection, issued an order remanding the case for a hearing on the issue raised by

Besco's absence from the Commerce store until it received Besco's letter of October 22, 1965, which revealed that fact (R. 325; G.C.X. 46(b)). Nor did the Union learn of Zale's presence until sometime after receipt of Besco's letter (R. 325; 291-292, 294).

Beyond question, the facts as to Besco's removal from the Commerce store, and Zale's arrival, were immediately known by the Employers during the representation proceedings (R. 325; R. Tr. 23, 30-33). However, they chose to remain silent as to these matters until the unfair labor practice proceeding (R. 325; R. Tr. 31). Neither K-Mart nor its licensees advised the Board of Besco's absence or of Zale's presence prior to the certification. Nor did they ever request the Board to clarify its certification, as provided under the Board's Rules and Regulations, Sec. 120.60(b) (29 C.F.R. 102.60(b).[37] Also, unlike the circumstances in *K-Mart San Fernando supra*, n. 36, no employees of Zale or of Besco voted or cast a challenged ballot in the election (R. 326). Again, at the unfair labor practice hearing, the Employers failed to

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Holly's objection. Upon the evidence adduced at the hearing, the Board issued a supplemental decision and direction in which it found that K-Mart was a joint employer of Holly's employees at the San Fernando store, included Holly's employees in the unit theretofore found appropriate, and directed the opening and counting of the ballots.

[37] This section of the Board's Rules and Regulations provides:

> A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer.

seek clarification of the unit, or to introduce any evidence that Zale is a joint employer of its employees with K-Mart, or that it should properly be included in the certified unit. Thus, the Employers failed to provide any support for their allegation that Zale is an "indispensable party". In any event, as the Board declared, "That Zale commenced operations before the certification is of no moment, as the certification established the majority status of the Union at the time of the election" (R. 326). Accord: *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 98-100; *N.L.R.B.* v. *Yutana Barge Lines Inc.*, 315 F. 2d 524, 527-528 (C.A. 9).

Finally, although the charge and complaint named Besco as a respondent, the Employers have no basis for complaint. For, this slight error was corrected at the unfair labor practice hearing, when counsel for the General Counsel declared that no bargaining order was sought against Besco (C. Tr. 23-24). Moreover, the Board's bargaining order herein is not directed to either Besco or Zale (R. 326-328).[38]

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[38] *N.L.R.B.* v. *Schnell Tool & Die Corporation*, 359 F. 2d 39 (C.A. 6), does not support Hollywood's contention that a determination of Zale's status is a necessary condition to the enforcement of the Board's bargaining order in the instant case (Hollywood Br. 7-8). For, in that case, after the entry of the Board's order, the named respondents ceased operations and sold their plants. The Court refused to enforce the order against the named respondents until after the Board determined through its own proceedings whether the purchaser constituted a "functioning employer against whom such a decree could in fact be enforced" (359 F. 2d at 44). In the instant case, all of the respondents named in the Board's order are functioning and well able to comply with its directions.

Hollywood's contention (Hollywood Br. 10-13) that the Union's demands for bargaining were fatally defective does not find support in the record. Thus, the Union's letter of September 21, 1965, to K-Mart, and its letters of October 18, 1965, to each of the licensees specifically mentioned the certification issued by the Board, stated that the certification was for "the employees in the K-Mart Store", and then requested "discussions" leading to a collective-bargaining agreement (R. 327; G.C.X. 41(a), 42(a), 43(a), 44(a), 45(a), 46(a), 47(a)). Each of the licensees except Besco, replied only that it was not "obligated" to comply with the Union's request (R. 327; G.C.X. 41(b), 42(b), 43(b), 44(b), 45(b), 47(b)). In its reply of September 29, 1965, rejecting the Union's request, K-Mart stated, *inter alia*, "that the unit of employees for which your Union seeks to act as the collective bargaining representative at our Commerce store is inappropriate" (R. 327; G.C.X. 41(b)). On October 19, 1965, the Union renewed its demand for bargaining by a letter which declared (R. 327; G.C.X. 48):

> So that there is no misunderstanding about the request made by the Union, this is to confirm the fact that the Union's request to bargain was a request upon your client to bargain in the *unit found appropriate by the Board.* (Emphasis in original.)

A review of the Union's bargaining requests shows nothing to support Hollywood's contention that the Union was seeking to abandon the certified unit and bargain on a single-employer basis. On the contrary,

as the Board properly observed, the Union's demand letters "could only be interpreted as a request for bargaining on a joint employer basis" (R. 327).

Clearly, it was not necessary that the Union's bargaining request conform to any specific form or be made in any specific words. *N.L.R.B.* v. *Albuquerque Phoenix Express*, 368 F. 2d 451, 453 (C.A. 10); *N.L.R.B.* v. *Barney's Supercenter, Inc.*, 296 F. 2d 91, 93 (C.A. 3); *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. denied 341 U.S. 914. Further, where as here, the record establishes beyond doubt that the Employers understood that a bargaining demand was being made by the certified representative of an appropriate unit of their employees, they were not at liberty to rely upon the Union's use of separate demand letters, and some apparent ambiguities in language taken out of context, as excuses for an absolute refusal to bargain. *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F. 2d 902, 908 (C.A. 9), cert. denied, 379 U.S. 961; *N.L.R.B.* v. *Scott & Scott*, 245 F. 2d 926, 927-928 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue denying the petitions to review and enforcing the Board's order in full.[39]

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[39] In requiring the Employers to bargain with the Union, the Board was well within its broad discretionary power to formulate an appropriate remedy. *Franks Bros. Company* v. *N.L.R.B.*, 321 U.S. 702, 704-706; *N.L.R.B.* v. *Carlton Wood Products*, 201 F. 2d 863, 867 (C.A. 9). It has long been recognized by the courts that the Board's orders must stand unless "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216. Accord: *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. Where, as here, an unlawful refusal to bargain has been found, the Board's bargaining order provides a remedy which the courts have long accepted as clearly consistent with the policies of the Act and within the Board's discretion. *International Ladies' Garment Workers* v. *N.L.R.B.*, 366 U.S. 731, 740; *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 432; *N.L.R.B.* v. *Carlton Wood Products, supra; Northern Virginia Steel Corporation* v. *N.L.R.B.*, 300 F. 2d 168, 175 (C.A. 4); *San Antonio Machine & Supply Corporation* v. *N.L.R.B.*, 363 F. 2d 633, 642-643 (C.A. 5).

Certificate

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

*   *   *   *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

*   *   *   *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other

terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . .

Representatives and Elections

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employes in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hear-

ing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Prevention of Unfair Labor Practices

Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with

or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filings of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with

it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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